Decided October 9, 1984

Appeal from decision of Area Manager, San Juan Resource Area, Moab District, Utah, Bureau of Land Management, requiring execution of right-of-way grant, U-52038.

## Remanded.

1. Rights-of-Way: Act of February 25, 1920 -- Rights-of-Way: Conditions and Limitations -- Rights-of-Way: Oil and Gas Pipelines

Neither Title VI of the Civil Rights Act of 1964 nor 43 CFR Part 17 require as a mandate of law that a grant of an oil and gas pipeline right-of-way include a provision requiring the grantee to initiate an affirmative action program where (1) the grantee is paying full fair market value for the right granted; (2) the grantee is not the recipient of other financial aid or benefits; and (3) there has been no finding of prior discriminatory practices by the grantee.

2. Rights-of-Way: Act of February 25, 1920 -- Rights-of-Way: Conditions and Limitations -- Rights-of-Way: Oil and Gas Pipelines

Pursuant to its discretionary authority under the Mineral Leasing Act, 30 U.S.C. § 185 (1982), BLM may include in a right-of-way grant a condition that the holder develop and submit specific goals and timetables, and engage in affirmative action with respect to the participation of minorities and women in employment and procurement. However, BLM may impose such an affirmative action clause only if applied uniformly and in a non-arbitrary fashion in accordance with specifically identified Departmental policy.

APPEARANCES: John N. Miller, Esq., and Kim R. Kolb, Esq., Findlay, Ohio, and Patrick G. Pitet, Esq., Casper, Wyoming, for appellant.

## OPINION BY ADMINISTRATIVE JUDGE STUEBING

Marathon Oil Company (Marathon) has appealed from a decision of the Area Manager, San Juan Resource Area, Moab District, Utah, Bureau of Land

83 IBLA 137

Management (BLM), dated December 6, 1982, requiring the execution of right-of-way grant U-52038 within 30 days of receipt of the decision.

On November 26, 1982, appellant filed an application for a 50-foot wide natural gas pipeline right-of-way pursuant to section 28 of the Mineral Leasing Act, as amended, 30 U.S.C. § 185 (1982). The right-of-way would include a portion of a 9-mile-long linear natural gas pipeline running from the Tin Cup Mesa unit to the Mountain Fuel natural gas pipeline. The right-of-way would cover 37.58 acres situated in San Juan County, Utah. In its December 1982 decision, BLM required execution of the right-of-way grant, which includes the following provision in paragraph 5 of section B ("Terms and Conditions"):

The holder agrees not to exclude any person from participating in employment or procurement activity connected with this grant on the grounds of race, creed, color, national origin, and sex, and to ensure against such exclusions, the holder further agrees to develop and submit to the proper reviewing official specific goals and timetables with respect to minority and female participation in employment and procurement activity connected with this grant. The holder will take affirmative action to utilize business enterprises owned and controlled by minorities or women in its procurement practices connected with this grant. Affirmative action will be taken by the holder to assure all minorities or women applicants full consideration of all employment opportunities connected with this grant. The holder also agrees to post in conspicuous places on its premises which are available to contractors, subcontractors, employees, and other interested individuals, notices which set forth equal opportunity terms; and to notify interested individuals, such as bidders, contractors, purchasers, and labor unions or representatives of workers with whom it has collective bargaining agreements, of the Company's equal opportunity obligations.

Appellant objects to the inclusion of paragraph 5 in the terms and conditions of the right-of-way grant.

In its statement of reasons for appeal, Marathon sets forth several arguments against imposing the subject affirmative action clause. Those arguments include: (1) the affirmative action clause constitutes a substantive rule which BLM should have promulgated through rulemaking pursuant to section 553 of the Administrative Procedure Act (APA), 5 U.S.C. § 553 (1982); (2) BLM should have published the affirmative action clause in the Federal Register pursuant to section 552(a)(1) of the APA, 5 U.S.C. § 552(a)(1) (1982); (3) the affirmative action clause is not enforceable because it constitutes a major rule such that BLM was required to prepare a regulatory impact analysis and a regulatory review pursuant to sections 3 and 4 of Exec. Order No. 12291, 3 CFR 127 (1982); (4) publication of the affirmative action clause in the Federal Register, and review by the Director of the Office of Management Budget, is mandated by the Paperwork Reduction Act of 1980, 44 U.S.C. § 3501 (1982); (5) there is no statutory or regulatory authority for BLM to impose the affirmative action clause in the right-of-way grant; (6) the affirmative action clause contravenes established Departmental policy

as evidenced by rescission of the regulations applicable to nondiscrimination in the context of Outer Continental Shelf (OCS) leasing activities, 43 CFR 35 (1981); and (7) the affirmative action clause lacks sufficient specificity, and unreasonably burdens the holder of the right-of-way with monitoring, reporting, and recordkeeping requirements.

We will address only those contentions necessary to establish the basis for the remand of this case to BLM.

We begin with the observation that the subject right-of-way instrument is entirely typewritten, rather than executed on a printed BLM or Departmental form. There is nothing in the case record to indicate the reason why the affirmative action provision was imposed by BLM in this instance. No brief on behalf of BLM has been filed by the Office of the Solicitor in response to this appeal. The Board, therefore, has been left to its own devices in considering the matter.

The inclusion of paragraph 5 in the terms and conditions of appellant's right-of-way grant imposes certain affirmative obligations on the holder of the right-of-way. In particular, the holder must "develop and submit \* \* \* specific goals and timetables with respect to minority and female participation in employment and procurement activity." Further, the holder must take "affirmative action" to utilize minority and female businesses and to assure all minorities and women of "full consideration" in employment.

We must point out that appellant mistakenly believes that right-of-way U-52038 will be issued "pursuant to Title V of the FLPMA [Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1761-1771 (1982)]" (SOR at 7). Rather, section A of the right-of-way grant provides that the right-of-way will be granted "pursuant to Section 28 of the Mineral Leasing Act of 1920 as amended (30 U.S.C. 185)." See Right-of-Way Requirements for Gathering Lines and Other Production Facilities Located Within Oil and Gas Leaseholds, Solicitor's Opinion, 87 I.D. 291 (1980). The granting of rights-of-way under the Mineral Leasing Act is governed by Departmental regulations under 43 CFR Part 2880.

We also note that failure "to comply with any term, condition, or stipulation of the right-of-way grant" may subject the right-of-way to suspension or termination, pursuant to 43 CFR 2883.6-1. See 30 U.S.C. § 185(o) (1982).

[1] Our first concern is to ascertain whether BLM has an obligation to include an affirmative action provision in this right-of-way as a mandate of law.

Section 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1982) (Title VI), which arguably forms the basis for paragraph 5, provides that "[n]o person \* \* \* shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial <u>assistance</u>." (Emphasis added.) Section 42 U.S.C. § 2000d-1 (1982) further provides that each Federal department may "effectuate the provisions of section 2000d of this title \* \* \* by issuing rules, regulations, or orders of general applicability." On December 4, 1964, the Department published regulations implementing Title VI of the Civil Rights Act of 1964, 43 CFR Part 17,

in the <u>Federal Register</u>. <u>See</u> 29 FR 16293 (Dec. 4, 1964). In addition to prohibiting specific discriminatory practices, the regulations provide for "affirmative action." 43 CFR 17.3(b)(4) provides as follows:

- (i) In administering a program regarding which the recipient has previously discriminated against persons on the grounds of race, color, or national origin, the recipient must take affir-mative action to overcome the effects of prior discrimination.
- (ii) Even in the absence of such prior discrimination, a recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color or national origin. [Emphasis added.]

Therefore, Subpart 17.3(b)(4)(ii) would authorize an affirmative action clause in the right-of-way grant if the requisite Federal financial assistance were present. 1/2

Title VI is applicable only in the case of a "program of activity receiving Federal financial assistance." 42 U.S.C. § 2000d (1982). See, e.g., Bob Jones University v. Johnson, 396 F. Supp. 597 (D. S.C. 1974), aff'd, 529 F.2d 514 (4th Cir. 1975). See also Grove City College v. Bell, 104 S. Ct. 1211 (1984) (construing 20 U.S.C. § 1681 (1982), a provision similar to Title VI, which also requires Federal financial assistance). Departmental regulation 43 CFR 17.2(e) defines Federal financial assistance as follows:

(e) The term "Federal financial assistance" includes (1) grants and loans of Federal funds, (2) grants or donations of Federal property and interests in property, (3) the detail of Federal personnel (4) the sale or lease of, or the permission to use (on other than a casual or transient basis), Federal property or any interest in such property without consideration or at a nominal consideration or at a consideration which is reduced for the purpose of assisting the recipient or in recognition of the public interest to be served by such sale or lease to the recipient, and (5) any Federal agreement, arrangement, or other contract which has as one of its purposes the provision of assistance.

In that event, however, the subject affirmative action provision would not serve, as Title VI includes only "race, color or national origin" within the protected or benefitted classes, omitting any reference to gender discrimination. Effective Mar. 2, 1973, 43 CFR Part 17 was amended to include nondiscrimination on the basis of "sex." 38 FR 5635 (Mar. 2, 1973). However, effective Mar. 3, 1978, 43 CFR Part 17 was again amended to delete the word "sex" because "Title VI does not provide authority to prohibit discrimination on the basis of sex." 43 FR 4259 (Feb. 1, 1978). The Federal Register notice further stated that nondiscrimination on the basis of sex would be dealt with in a "separate regulation."
Id. To date, no regulations with respect to sex discrimination in connection with federally assisted programs or activities have been promulgated by the Department.

Appendix A to 43 CFR Part 17 states in pertinent part:

Federal financial assistance subject to Part 17 includes, but is not limited to, that authorized by the following statutes:

I. Public Lands and Acquired Lands.

\* \* \* \* \* \* \*

(b) Sale, lease, grant, or other disposition of, or the permission to use, Federal property or any interest in such property at less than fair market value.

\* \* \* \* \* \* \*

16. <u>Rights-of-way for Pipelines to Transport Oil or Natural Gas</u> (41 Stat. 449, as amended, 30 U.S.C. 185). [Emphasis added.]

A natural gas pipeline right-of-way issued pursuant to section 28 of the Mineral Leasing Act, supra, is subject to an annual rental charge, which shall be "the fair market rental value of the right-of-way or permit, as determined by the Secretary or agency head." 30 U.S.C. § 185(1) (1982). The Department's right-of-way regulations also provided for no charge or a charge less than fair market value in certain circumstances under 43 CFR 2803.1-2(c). This provision was carried into the applicable regulation for natural gas pipeline rights-of-way, 43 CFR 2883.1-2 (1982). However, effective October 4, 1982, 43 CFR 2883.1-2 was amended to provide that "the provisions of § 2803.1-2(c) of this title shall not apply" (47 FR 38807 (Sept. 2, 1982)). Therefore, it would appear that the grant of a right-of-way pursuant to section 28 of the Mineral Leasing Act, supra, does not come within the definition of "Federal financial assistance" set forth in 43 CFR Part 17 and, thus, is not subject to Title VI of the Civil Rights Act of 1964, or the Department's implementing regulations. This conclusion is borne out in a memorandum dated June 23, 1982, to the Director, BLM, from the Associate Solicitor, Energy and Resources, prior to the change in 43 CFR 2883.1-2. That opinion states at page 4: "Pipeline rights-of-way under section 28 of the Mineral Leasing Act are subject to the Title VI regulations if they are issued at an annual rental which is less than fair market value, as permitted in specified cases by 43 CFR § 2803.1-2(c)." (Emphasis added.) Because natural gas pipeline rights-of-way may no longer be issued at less than fair market value under any circumstances, such a right-of-way may not be subject to Title VI regulations, unless the undertaking is receiving Federal financial assistance in some other form.

We conclude that the subject right-of-way grant does not constitute Federal financial assistance. Moreover, there is nothing in the record to indicate that Marathon is otherwise the recipient of such financial assistance, or that it is an entity which has previously discriminated on the grounds of race, color or national origin (which BLM may establish on remand). Therefore, the Board cannot find that the imposition of the affirmative action clause is required by law or regulation in this instance.

[2] The next issue to be addressed is whether BLM is <u>authorized</u> at discretion to include paragraph 5 in a right-of-way grant for a natural gas pipeline. Natural gas pipeline rights-of-way through Federal lands are authorized by section 101 of the Act of November 16, 1973, 87 Stat. 576 (1973), which amended section 28 of the Mineral Leasing Act, <u>supra.</u> 43 CFR 2881.2(a)(3) provides that "in the construction, operation and maintenance of the pipeline and related facilities, there shall be no discrimination against any employee or applicant for employment because of race, creed, color, sex or national origin and all subcontracts shall include an identical provision." Pursuant to Subpart 2881.2(a)(3), it is appropriate that such right-of-way grants contain some form of nondiscrimination clause. Therefore, the issue is whether the mandate of "no discrimination" authorizes the Department to require affirmative action, as set forth in paragraph 5 of the terms and conditions.

Section 28 of the Mineral Leasing Act, <u>supra</u>, provides broad discretion to the Secretary in the granting of a natural gas pipeline right-of-way. Section 101(a) of the Act of November 16, 1973, <u>supra</u>, which amended section 28 of the Mineral Leasing Act, <u>supra</u>, provides that the Secretary "may" grant such rights-of-way. In the context of oil and gas leases issued pursuant to the Mineral Leasing Act, we have long held that the broad discretion granted to the Secretary, inherent in the word "may" in a comparable provision of the statute, includes not only the authority to refuse to issue a lease, but to condition issuance of the lease on acceptance of certain conditions. <u>See</u>, <u>e.g.</u>, <u>Carl J. Taffera</u>, 71 IBLA 72 (1983); <u>Neva H. Henderson</u>, 31 IBLA 217 (1977). <u>See also Southwestern Petroleum Corp.</u> v. <u>Udall</u>, 361 F.2d 650 (10th Cir. 1966); <u>Duesing</u> v. <u>Udall</u>, 350 F.2d 748 (D.C. Cir. 1965). However, the purpose of such conditions must be consistent with the public interest and the means to accomplish the intended purpose should be reasonable. <u>Neva H. Henderson</u>, <u>supra</u>; <u>Cartridge Syndicate</u>, 25 IBLA 57 (1976).

The case of Western Slope Gas Co., 40 IBLA 280 (1979), is instructive in this area. Western Slope similarly involved a natural gas pipeline right-of-way. In that case, BLM had required the appellant to conduct a cultural resources inventory on all non-Federal land traversed by the proposed pipeline as a precondition to the grant of a right-of-way across Federal land. The first issue addressed was whether inclusion of the condition was mandated by section 106 of the National Historic Preservation Act, as amended, 16 U.S.C. § 470 (1982), because the right-of-way grant came within the meaning of a "federally assisted" undertaking. That Act provides for taking into account the effect of such an undertaking on objects included or eligible for inclusion in the National Register. We concluded that the portion of the right-of-way on non-Federal land could not be considered a "federally assisted" undertaking and, thus, the appellant could not be required to conduct a cultural resources inventory on non-Federal land as a function of the National Historic Preservation Act. However, we held that BLM might reasonably impose some such protective measures as a matter of discretion. Western Slope Gas Co., supra at 290. We remanded the case to BLM to determine what, if any, preconditions would be justified to protect the public interest. See Grindstone Butte Project, 24 IBLA 49 (1976), aff'd, Grindstone Butte Project v. Kleppe, 638 F.2d 100 (9th Cir. 1981). The Secretary has broad discretion regarding the amount of information he may require from an applicant for a right-of-way. See Effect of the Federal Land Policy and Management Act on the Right-of-Way Application for Middle Fork of the Power River Reservoir, Solicitor's Opinion, 90 I.D. 345 (1983).

FLPMA provides that rights-of-way shall be subject to such terms and conditions as the Secretary may prescribe. 42 U.S.C. § 1764(c) (1982). The approval of a right-of-way application under FLPMA is also within the Secretary's discretion. Charles W. Nelson, 75 IBLA 115 (1983); Bumble Bee Seafoods, Inc., 65 IBLA 391 (1982).

Accordingly, we conclude that BLM is entitled to impose the subject affirmative action clause pursuant to its discretionary authority under section 28 of the Mineral Leasing Act, <u>supra</u>, and pursuant to the mandate of "no discrimination" contained in 43 CFR 2881.2(a)(3). As the Associate Solicitor, Public Lands, stated in <u>Solicitor's Opinion</u>, M-36500 (May 5, 1958), at page 2: "Where the authority to grant a right to public land is discretionary, the authorized officer may qualify grants of benefits by making them subject to conditions deemed by him to be in the public interest." <u>See also Ivanhoe Irrigation District</u> v. <u>McCracken</u>, 357 U.S. 275, 295 (1958), and cases cited therein. "Also beyond challenge is the power of the Federal Government to impose reasonable conditions on the use of federal funds, federal property, and federal privileges." <u>Id.</u> Failure to comply with any term, condition, or stipulation of the right-of-way grant authorizes the appropriate officer to institute procedures to suspend or terminate the right-of-way grant. 43 CFR 2883.6-1. <u>See</u> 30 U.S.C. § 185(o) (1982).

However, even though BLM has discretionary authority to impose the affirmative action clause, it should do so only if the clause is applied uniformly to all similar right-of-way grants, consistent with Departmental policy. Should BLM attempt to impose the subject clause on appellant arbitrarily, then that action would be subject to reversal for abuse of discretion, and as arbitrary and capricious. Based on the record before us, the Board is unable to determine whether inclusion of the clause is being uniformly applied, or whether its use is consistent with Departmental policy. Therefore, it is essential for this Board to remand this matter to BLM for further consideration. This Board is aware of various types of nondiscrimination conditions in other right-of-way grants. Such nondiscrimination clauses appear consistent with 43 CFR 2881.2(a)(3). However, we have never before encountered the subject affirmative action clause in a pipeline right-of-way.

As the record does not reflect the basis for inclusion of the clause in this instance, and no brief has been filed in support of BLM's decision to require it, the Board will suspend the effect of the provision pending further action by BLM. The case is remanded to the Area Manager, San Juan Resource Area, with instructions to ascertain whether there is any basis for inclusion of the affirmative action provision in the right-of-way grant. If it is found that inclusion of the provision comports with specifically identified and documented Departmental policy and that such policy is being uniformly applied in all similar right-of-way grants, the Area Manager shall, by separate decision, re-invoke the provision with immediate effect, which decision shall be subject to appeal. 2/

<sup>2/</sup> In a memorandum to the Assistant Solicitor, Realty, dated February 26, 1980, the Assistant Solicitor, Equal Opportunity Compliance (EOC), proposed an "equal employment opportunity/affirmative action clause" for inclusion in right-of-way grants "when there is no specific statute authorizing such

Alternatively, if the Area Manager finds that appellant is an entity receiving Federal financial assistance and/or is engaged in a program regarding which the recipient has previously discriminated against persons on the basis of race, color, or national origin, a substituted affirmative action provision must be imposed, eliminating references to gender (see n.1). 43 CFR 17.3(4)(i). Such action by the Area Manager shall be subject to appeal.

Absent either of the alternative findings described above, the Area Manager shall amend the right-of-way instrument to delete paragraph 5 of section B ("Terms and Conditions") <u>nunc pro tunc</u>.

Pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is remanded to BLM for further action consistent with this decision.

Edward W. Stuebing Administrative Judge

We concur:

James L. Burski Administrative Judge

Gail M. Frazier Administrative Judge

fn. 2 (continued)

<u>language</u>" (Memorandum at 1 (emphasis supplied)). The proposed clause is identical to paragraph 5 in appellant's right-of-way grant. The Assistant Solicitor, EOC, in addition, bracketed the language in the clause having to do with "affirmative action" and stated that such language "should be excluded when there is a new Company formed which cannot reasonably be held accountable for past discrimination practices" (Memorandum at 1 n.1). In Instruction Memorandum (IM) No. 80-553, dated June 3, 1980, the Director, BLM, instructed all State Directors to include the proposed clause in right-of-way grants and other land use authorizations, "when there is no specific statute authorizing such language" (IM No. 80-553 at 1).

We are unable to ascertain, however, whether the purpose of this memorandum was to delineate the <u>language</u> to be used where Title VI applied or represented a policy determination that this language should be included in all permits where Title VI, itself, did not apply. This matter should be clarified on remand.